

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**



In The  
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-1021  
NO. 75-1021

APPEAL

from the

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

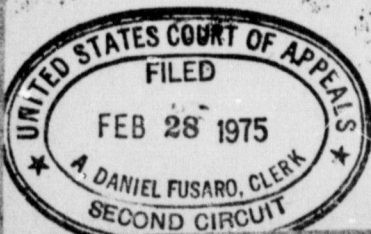
-APPELEE,

vs.

MARTIN F. BURKE,

DEFENDANT-APPELLANT

DEFENDANT-APPELLANT'S BRIEF AND  
APPENDIX



Submitted by:

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West Hartford, Conn. 06117

Attorney for Defendant-  
Appellant

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DEFENDANT-APPELLANT'S BRIEF

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II. ISSUES PRESENTED.

A. ARE THE HEARSAY STATEMENTS OF A NAMED INFORMANT IN A SEARCH WARRANT AFFIDAVIT SUFFICIENT, WITHOUT ANY SHOWING OF THE INFORMANT'S TRUSTWORTHINESS, TO SUPPORT A FINDING OF PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT?

B. DOES THE FAILURE OF A SEARCH WARRANT TO COMPORT TO THE REQUIREMENTS OF RULE 41(C), FEDERAL RULES OF CRIMINAL PROCEDURE, PERTAINING TO DESIGNATION OF THE EXECUTING OFFICER, DESIGNATION OF A FEDERAL MAGISTRATE TO WHOM THE WARRANT IS TO BE RETURNED, AND SPECIFICATION OF THE PERIOD WITHIN WHICH THE WARRANT IS TO BE EXECUTED, RENDER THE WARRANT INVALID?

### III. STATEMENT OF THE CASE.

#### A. HISTORY OF THE DISTRICT COURT PROCEEDINGS.

The defendant-appellant Martin Burke was indicted in June 1974 for violation of 26 U.S.C. §§5861(d) and 5871, involving possession of an unregistered firearm. The principle evidence against the defendant, a sawed-off shotgun, was obtained during a search of the defendant's apartment conducted pursuant to a search warrant issued and executed on August 21, 1973. The defendant moved to suppress this evidence, contending that the warrant was not supported by probable cause and that the warrant failed to comply with the requirements of Rule 41(c), Federal Rules of Criminal Procedure. A hearing on the motion was held on October 29, 1974: the defendant rested after placing the warrant, warrant application, and warrant return into evidence [Appendix, pps. 1-4]; the Government presented no evidence. The motion was denied by the District Court, Clarie, C.J., without written opinion. The defendant thereupon pleaded guilty to the indictment, reserving the right to appeal to this Court the lower court's denial of his motion to suppress.

On December 23, 1974, the defendant was sentenced to a suspended term of two years' imprisonment with three years probation. A timely notice of appeal was filed on January 3, 1975.

B. STATEMENT OF THE FACTS.

The facts of this case are fairly simple and do not appear to be in dispute.

On August 21, 1973, Connecticut State Police Department Officers Bourbeau and Raposa and United States Treasury Department Agent Hampp applied to a Connecticut state court judge for a federal search warrant to search the defendant's apartment for an unregistered firearm, to wit, a sawed-off shotgun.

In support of their application, the three men submitted a joint affidavit [Appendix, pps. 2-3] containing the following information:

1. A recital of the respective official positions of the three affiants [paragraphs 1, 2, and 3].
2. A recital of the statements of one Lonnie Thompson that he had seen on the previous day a sawed-off shotgun in the defendant's apartment and had been told by the defendant that the shotgun was stolen in a burglary [paragraphs 4 and 5].
3. A recital of the negative results of attempts to locate a registration for such a shotgun with the National Firearms Register and Transfer Record [paragraph 6].

4. A recital of the affiants' conclusion as to the existence of probable cause to search the defendant's apartment for the shotgun [paragraph 7].

The warrant affidavit contained no direct assertion by the affiants or other indication of Lonnie Thompson's reliability.

On the basis of this affidavit, a federal search warrant [Appendix, p. 1] was issued by a Connecticut circuit court judge, authorizing a search of the defendant's apartment at 279 Westland Street, Hartford, Connecticut, for a sawed-off shotgun possessed in violation of 26 U.S.C. §5861(d).

This warrant and the aforementioned affidavit were prepared on forms normally reserved for state search warrants, and the "boilerplate" language on the face of the warrant was, accordingly, directed to the requirements of §54-33a, Connecticut General Statutes, which provides for issuance of state search warrants. Thus, in compliance with the state statutory dictates, the warrant, inter alia, was addressed to "any Police Officer of a regularly organized police department or any State Policeman to whom these presents shall come," commanding him to execute the warrant "within a reasonable time of the date of this warrant" and "with reasonable promptness make due

return of this warrant accompanied by a written inventory of all property seized." [Appendix, p. 1]

There is no dispute that these instructions do not comport with Rule 41(c), Federal Rules of Criminal Procedure, which states, in relevant part:

The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specific period not to exceed ten days, the person or place named for the property specified. .... It shall designate a federal magistrate to whom it shall be returned.

Pursuant to this warrant, a search was conducted of the defendant's premises on August 21, 1973, and a sawed-off shotgun was discovered.

No return to the warrant, nor written inventory was ever given to the defendant or filed with any state or federal court or judicial officer. [Appendix, p. 4 (Unexecuted Warrant Return)]

IV. ARGUMENT: THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE SHOTGUN.

- A. THE SHOTGUN WAS SEIZED PURSUANT TO A SEARCH WARRANT NOT FOUNDED ON PROBABLE CAUSE, IN THAT THE SEARCH WARRANT AFFIDAVIT CONTAINED NO DIRECT ASSERTION OR OTHER INDICATION OF THE RELIABILITY OF THE NAMED INFORMANT THEREIN OR HIS ALLEGATIONS.

The primary issue raised in this appeal is whether the hearsay statements of a named informant in a search warrant affidavit are sufficient, without any showing of the informant's trustworthiness, to support a finding of probable cause to issue the search warrant.

The underlying facts are not in dispute: probable cause for the issuance of the search warrant involved in this case was provided solely by the hearsay statements of one Lonnie Thompson contained in the warrant affidavit; the affidavit contained no direct assertion by the affiants or other indication of Thompson's past or present reliability.

The defendant contends that under the established law of Aguilar v. Texas, 378 U.S. 108 (1964), Spinelli v. United States, 393 U.S. 410 (1968), and United States v. Harris, 403 U.S. 573 (1971), a showing in the affidavit of the identified informant's reliability is required when the informant's hearsay statements provide probable cause for the issuance of the search warrant. The Government contends, and the district court held, that Aguilar and Spinelli do not apply to named informants.

The relevant case law has been clearly enunciated by the United States Supreme Court and may be set forth concisely: while a search warrant may properly issue on the basis of an affidavit containing an informant's hearsay statements of probable cause, Jones v. United States, 362 U.S. 257 (1960), such hearsay must be buttressed by a showing of (1) the basis for the informant's beliefs<sup>1</sup> and (2) the trustworthiness of the informant. Aguilar, supra, at 114; Spinelli, supra, at 416-7.

In argument below, the Government contended that no showing of reliability is required when the informant is specifically named in the affidavit. This attempt to distinguish the holdings of Aguilar and Spinelli misperceives the central concern of the cases and is clearly in error.

Although Aguilar and Spinelli involved unidentified informants, the holdings of the cases are not premised on the anonymity of the informant, but rather on the unestablished reliability of his hearsay allegations. As Chief Justice Burger observes in his plurality opinion in United States v. Harris, supra, the roots of Aguilar and Spinelli lie in Jones v. United States, supra, a case in which the Supreme Court upheld a warrant affidavit based almost

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1. The defendant does not claim the affidavit was insufficient in this respect.

entirely on hearsay because there was a "substantial basis" for crediting the hearsay; Aguilar's "two-pronged" test reflects the Court's attempt to provide a formula for determining when such a substantial basis for crediting the hearsay in an affidavit exists. Harris, supra, at 580-1. As this Circuit has recognized, "The principle in all these cases, of course, is that the magistrate must have a substantial basis for crediting the hearsay." United States v. Sultan, 463 F.2d 1066, 1069 (2d Cir. 1972).

The anonymity of the informant is clearly treated as an incidental factor in Aguilar and Spinelli, as the language of the opinions makes clear. The holding in Aguilar specifically focuses on the hearsay nature of the information in the affidavit, while mentioning the identity of the informant only in passing:

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed ... of some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, \* \* \*, was "credible" or his information "reliable." Aguilar, supra, at 114.

Similarly, in Spinelli:

Neither should the warrant issue if the officer states there is gambling equipment in a particular apartment and that his information comes from an informant, named or unnamed, since the honesty of the informant and the basis for his report are unknown. Spinelli, supra, at 424 (White, J., concurring) (emphasis added).

Indeed, in Spinelli, the Court expressly patterns its analysis of the search warrant on its analysis in Draper v. United States, 358 U.S. 307 (1959), a case involving a named informant whose reliability was explicitly established. Spinelli, supra, at 416-7, n. 5; Draper, supra, at 309.

The defendant's argument that Aguilar and Spinelli are applicable to this case is directly supported by the holdings of federal courts confronted with the issue presented herein. Where, as in this case, a search warrant affidavit fails to set forth any indication of an informant's reliability other than his name, federal courts have ruled the affidavit does not contain a showing of trustworthiness sufficient to support a finding of probable cause.

In United States ex rel. Saiken v. Benzinger, 489 F.2d 865 (7th Cir. 1973), the warrant at issue was, as here, based on the hearsay of a named but otherwise undescribed informant. Moreover, the informant in that case had the same surname as the prospective defendant, raising the possibility that the informant was related to the defendant and was therefore more likely to be reliable, cf., United States v. Sultan, supra. Even in the special

circumstances of that case, the mere naming of the informant was deemed insufficient to provide the degree of reliability required by the Supreme Court. The Seventh Circuit Court of Appeals invalidated the warrant, adopting the holding of the district court that

"it makes no difference, under Aguilar, whether or not the informant's identity is disclosed, although disclosure may enforce credibility and reliability." United States ex rel. Saiken v. Elrod, 350 F.Supp 1156, 1158 (N.D. Ill. 1972); Accord: United States v. Davis, 346 F.Supp 435 (S.D. Ill. 1972).

The District of Columbia Court of Appeals has similarly invalidated a warrant based on the statements of a named informant because the warrant affidavit failed otherwise to establish the informant's reliability. United States v. McSurely, 473 F.2d 1178, 1186 (D.C. Cir. 1972). Even though the affidavit characterized the informant as a "reputable citizen," such additional description was not deemed sufficient to show the informant's trustworthiness.

In Flanagan v. Rose, 478 F.2d 222 (6th Cir. 1972), the same conclusion was reached by the Sixth Circuit, where, as in the instant case, the affidavit contained nothing as to trustworthiness but the informant's name. Invalidating the warrant, the court

there noted:

The affidavit does not identify David Hindman. There is nothing to establish or even suggest that David Hindman was an individual upon whose information reliance could be placed. Flanagan, supra, at 223.

Such comments are, of course, equally applicable to this case and Lonnie Thompson.

This Circuit has consistently required a showing in the affidavit of the trustworthiness of an identified informant in order to uphold the consequent search warrant. United States v. Sultan, supra; United States v. Dzialik, 441 F.2d 212 (2d Cir. 1971); United States v. Viggiano, 433 F.2d 716 (2d Cir. 1970); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); United States v. Canestri, 376 F.Supp 1149 (D.Conn. 1974).

While a showing of trustworthiness may derive from factors other than a direct assertion of reliability, Harris, supra, at 581-2; Sultan, supra, at 1068-9, the affidavit must contain sufficient information from which a magistrate can conclude that there is a "substantial basis" for believing the named informant to be reliable. Sultan, supra.

If a named informant's statements are exceptionally detailed, United States v. Dzialik, supra; Draper v. United States, supra; or include admissions against the informant's own penal interest, United States v. Viggiano, supra; United States v. Harris, supra; or are based on the informant's special relationship to the accused or the alleged crime, United States v. Sultan, supra; or are corroborated by independent investigation, Sultan, supra; Dzialik, supra; Viggiano, supra; or are substantiated by evidence of the accused's reputation, Harris, supra; the trustworthiness of the informant may be deemed sufficiently established even though no direct assertion of reliability is made in the affidavit.

However, such indicia of reliability, sufficient to create the required substantial basis, must, in fact, be present in the affidavit. Sultan, supra; Harris, supra.

This Circuit has never held that mere identification of the informant provides the required substantial basis. In Dzialik, the informant was named, but the court nevertheless inquired into his reliability; the informant's official position as a railroad investigator, the detailed nature of the informant's report, and the independent corroboration by the FBI of the informant's allegations were the factors deemed sufficient by the court to

render the informant reliable.

Similarly, in Viggiano, the court inquired into the trustworthiness of a named informant, finding him reliable because of the detailed and self-incriminatory nature of his information and because of the corroboration, in the form of tangible evidence provided by the informant as well as by independent investigation, of the information.

Accord: United States v. Sultan, supra; United States v. Bozza, supra; United States v. Canestri, supra.

The applicable law is thus clear. Federal courts have uniformly held that Aguilar and Spinelli do apply to an informant named in a search warrant affidavit; only when a search warrant affidavit has contained sufficient indicia of a named informant's reliability have federal courts been willing to uphold the warrant. Mere identification of the informant has been insufficient, by itself, to establish the necessary showing. United States v. Sultan, supra; United States v. Dzialik, supra; United States ex rel. Saiken v. Benzinger, supra; United States v. McSurely; Flanagan v. Rose, supra.

In the instant case, Thompson's trustworthiness is not established by any of the aforementioned indicia of reliability. There is no statement of the affiants' knowledge of Thompson's past or present reliability; Thompson's statements are not detailed in nature; Thompson's statements contain no admissions against his own penal interest; Thompson's information is not corroborated by independent investigation<sup>2</sup> or evidence; Thompson had no special relationship to the defendant or the alleged crime.

The search warrant affidavit in this case failed to satisfy the requirements of Aguilar, Spinelli, and Harris, as well as the established law of this Circuit, with respect to the reliability of Lonnie Thompson. Thus, the search warrant was improperly issued without sufficient probable cause, and the shotgun seized pursuant to the warrant should have been suppressed. Weeks v. United States, 232 U.S. 383 (1914).

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2. The negative result of the search for a registration for the shotgun does not corroborate Thompson's allegations, since the the result would be negative (i.e., no registration would be found) whether or not the shotgun did, in fact, exist.

B. THE SHOTGUN WAS SEIZED PURSUANT TO AN INVALID SEARCH WARRANT, IN THAT THE WARRANT DID NOT COMPORT WITH THE REQUIREMENTS OF RULE 41(c), FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 41(c), Federal Rules of Criminal Procedures, which provides for the issuance and contents of federal search warrants, states, in relevant part:

The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. .... It shall designate a federal magistrate before whom it shall be returned.

The search warrant at issue in this case failed to comport with these requirements of Rule 41(c), in that (1) the warrant is directed to state and local, rather than federal officers; (2) the warrant does not designate a federal magistrate to whom it shall be returned; and (3) the warrant does not command the officer to search within a specified period of time not to exceed ten days, but rather merely requires execution within a reasonable time.

The defendant contends that these deficiencies in the search

warrant require its invalidation and invalidation of the pursuant search, under this Court's supervisory powers over federal law enforcement. Rea v. United States, 350 U.S. 214 (1956); United States v. Klapholz, 230 F.2d 494 (2d Cir. 1956); United States v. Pechac, 56 F.R.D. 187 (D.Ariz. 1972).

It should first be noted that although the warrant was prepared on state search warrant forms and was issued by a state court judge, it is clearly a federal search warrant. The warrant application alleges possession of an unregistered firearm in violation of federal law (26 U.S.C. §5861d). Connecticut state law does not, in fact, prohibit possession of an unregistered shotgun, §29-27, et seq., Connecticut General Statutes, and thus no state search warrant could have been secured on the basis of the warrant affidavit.

Since the warrant was a federal warrant, Rule 41, F.R.Crim.P., is applicable. "If the warrant was issued under authority of Rule 41 as a federal warrant, clearly it must comply with the requirements of the rule." United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973). Rule 41 "binds federal courts and federal law enforcement officers," Navarro v. United States, 400 F.2d 315, 318 (5th Cir. 1968), irrespective of how well-intentioned the officers may have been. Id., at 319.

It is a well-established principle that there must be strict compliance with whatever formalities are required by statute with respect to issuance and execution of search warrants. Rea v. United States, supra; United States v. Borkowski, 268 F. 408 (S.D.Ohio 1920); United States v. Musgrave, 293 F. 203 (D.Neb. 1923). As one commentator has aptly explained, such strict adherence to statutory formalities is necessary because

"there is not a description of process known to law, the execution of which is more distressing to the citizen. Perhaps there is none which excites such intense feeling in consequence of its humiliating and degrading effects."  
Archibald's Criminal Practice and Procedure,  
8th. edition, p. 131.

The mandatory nature of the procedural requirements of Rule 41 and the duty of the federal courts to enforce such requirements were set forth by the United States Supreme Court in Rea v. United States, supra, at 217-8:

[The Rules] are designed as standards for federal agents. ... Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings.

"The direction in a search warrant is an essential part of the warrant," United States v. Smith, 16 F.2d 788 (S.D.Fla. 1927), and is designed to serve several social and individual interests.

Primarily, designation of the executing officer insures that an appropriate federal officer will, in fact, execute the warrant and establishes responsibility in case the warrant is not executed or is executed improperly. In addition, designation of the executing officer helps protect against fraudulent search and allays the fear that an officer is acting in bad faith without specific judicial authorization. Of course, designation of the executing officer also establishes a record and facilitates any subsequent criminal or civil review that may become necessary. United States v. Soriano, 482 F.2d 469 (5th Cir. 1973).

In short, designation of the executing officer insures identification of someone who will be accountable, to both society and the individual, for improper execution of the warrant. The importance of this concept of accountability in the issuance and execution of search warrants was affirmed only recently by the United States Supreme Court. United States v. Giordano, 416 U.S. 505 (1974).

Several courts have ruled that a warrant's failure to

designate an appropriate civil officer of the United States to execute the warrant invalidates the warrant. United States v. Musgrave, 293 F. 203 (D.Neb. 1923); United States v. Kohlman, 51 F.2d 313 (M.D.Penn. 1931); United States v. Leach, 24 F.2d 965 (D.Del. 1928); cf., Steele v. United States, No. 2, 267 U.S. 505 (1925). These cases generally deal with federal agents who, for technical reasons, did not fall under the definition of "civil officer of the United States ..." In the instant case, the direction of the federal warrant to state officers was completely improper and far more serious than the technical violation held to invalidate the warrant in the above-cited cases.

In United States v. Soriano, supra, the issuing magistrate neglected to complete the applicable blank space on the warrant with the name of the officer he knew would be executing the warrant. The Fifth Circuit Court of Appeals declined to invalidate the warrant, but only because oral testimony subsequently revealed that the mistake was purely clerical in nature with no actual impact. The underpinnings of the Soriano decision are most relevant to the instant case, for in Soriano,

"the relevant interests were protected. The magistrate knew in advance, and the designated officer indeed served [the warrant]; the occupants of the subject premises received a panoply of identifications and confirmations of identification from the serving officer

and those assisting him; a record of the name of the serving officer and those assisting him was made by signatures on the reverse side of the warrant; and responsibility for execution of the warrant was fixed." Soriano, supra, at 479.

In the instant case, the relevant interests were not protected. There has been no showing that the issuing judge knew that the warrant could only be executed by a federal officer or that the judge knew which federal officer would, in fact, execute it. Indeed, the record does not even reveal which, if any, federal officer did, in fact, execute the warrant: the officer did not, as in Soriano, sign the back of the warrant, nor did the officer prepare a warrant return and written inventory, as required under Rule 41(d), F.R.Crim.P., and the face of the warrant itself. There can be no question that this failure to file a return is clearly attributable to the uncertainty as to responsibility for preparing such process created by the improper direction in the warrant.

Responsibility for execution of the warrant was not fixed prior to the search, nor established subsequent to the search.

In light of the absence of a return and inventory, the issuing judge's failure to designate a federal magistrate for receipt of such

process becomes particularly significant. Not only was no executing federal officer accountable for the conduct of the search, but no federal judicial officer was designated to hold such officer accountable. Not surprisingly, the accountability insured by the requirement of Rule 41(d) of a prompt return and inventory was disregarded.

In contrast to Soriano, the violations of Rule 41 apparent on the face of the warrant are both technical and substantive in nature. Where, as here, statutory standards are violated, and where, as here, such violations produced several possible and established substantive deficiencies in the execution of the warrant, the warrant must be declared invalid. Rea v. United States, supra.

Accordingly, the shotgun, which was seized pursuant to the deficient warrant, should have been suppressed as evidence against the defendant. Weeks v. United States, supra.

V. CONCLUSION.

For the foregoing reasons, the District Court erred in denying the defendant's motion to suppress the shotgun, and the judgment of the District Court should be reversed.

RESPECTFULLY SUBMITTED,

MARTIN BURKE  
Defendant-Appellant

BY: /s/ DAVID S. GOLUB  
\_\_\_\_\_  
DAVID S. GOLUB, Esq.  
1800 Asylum Avenue  
West Hartford, Conn. 06117  
His Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed,  
postage pre-paid, to Peter Dorsey, United States Attorney, 450  
Main Street, Hartford, Conn., this 27th day of February, 1975.

/s/ DAVID S. GOLUB

DAVID S. GOLUB, ESQ.

APPENDIX

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STATE OF CONNECTICUT  
CIRCUIT COURT

The foregoing Affidavit and Application for Search and Seizure Warrant having been presented to and been considered by the undersigned, a Judge of the Circuit Court, the undersigned (a) is satisfied therefrom that grounds exist for said Application, and (b) finds that said Affidavit establishes grounds and probable cause for the undersigned to issue this Search and Seizure Warrant, such probable cause being the following: From said Affidavit, the undersigned finds that there is probable cause for the undersigned to believe that the property described in the foregoing Affidavit and Application is within or upon the person, if any, named or described in the foregoing Affidavit and Application, or the place or thing, if any, described in the foregoing Affidavit and Application, under the conditions and circumstances set forth in the foregoing Affidavit and Application, and that, therefore, a Search and Seizure Warrant should issue for said property.

NOW THEREFORE, by Authority of the State of Connecticut, I hereby command any Police Officer of a regularly organized police department or any State Policeman to whom these presents shall come within a reasonable time after the date of this warrant to

☒ enter into or upon and search the place or thing described in the foregoing Affidavit and Application, to wit: Apt. #3, of 279 Westland St., Htfd., Conn., occupied and resided in by Martin Burke. The apt. is constructed of brick and faces in a northerly direction.

☒ search the person described in the foregoing Affidavit and Application, to wit: Martin Burke

for the property described in the foregoing Affidavit and Application, to wit: Single shot sawed-off shotgun, approximately two feet of less in length, adapted to fire .38 Caliber bullets.

and upon finding said property to seize the same, take and keep it in custody until the further order of the court, and with reasonable promptness make due return of this warrant accompanied by a written inventory of all property seized.

Subscribed and sworn to before me at Hartford, Connecticut, this 21 day of August 1977

August 1977

SIGNED (Judge of the Circuit Court)

STATE OF CONNECTICUT  
CIRCUIT COURT

*Clerk Disposition Certificate (page 4) must be completed.*

TO: A Judge of the Circuit Court

The undersigned, being duly sworn, complains on oath that the undersigned has probable cause to believe that certain property, to wit:

1. Single shot, sawed-off shotgun, approximately two feet <sup>or less</sup> in length, adapted to fire .38 caliber bullets.

☒ is possessed, controlled, designed or intended for use as a means of committing the crime of . . . by Martin Burke, of 279 Westland St., Apt. #3, Htfd., Conn.

☒ is or has been or may be used as the means of committing the crime of . . . To Receive or Possess a Firearm, which is not Registered to Him in the National Firearms Registration and Transfer Record. Title 26, USC Sec. 58-61d.

☐ was stolen or embezzled from . . .

And is within or upon a certain person, place, or thing, to wit . . . Apt. #3, of 279 Westland St., Htfd. Conn., occupied and resided in by Martin Burke. The apt. is constructed in brick and faces in a northerly direction.

And that the facts establishing the grounds for issuing a Search and Seizure Warrant are the following . . .

1. That, I Tpr. David Bourbeau #458, am a member of the Conn. State Police Dept., and have been since 9-29-69, and presently assigned to Troop H, Htfd., Conn.
2. That, I Tpr. Richard A. Raposa #250, am a member of the Conn. State Police Dept., and have been since 3-2-70, and presently assigned to Troop E, Htfd., Conn.
3. That, I S.A. Robert Hampo, am a member of the U.S. Treasury Dept., Alcohol, Tobacco & Firearms Div., and have been since 9-69, and presently assigned to Htfd., Conn.
4. That, on 8-21-73, at 0755 hrs., Lonnie C. Thompson, of 104 Kensington St., Htfd., Conn., was interviewed and submitted a written statement and will testify to the fact that on 8-20-73, at 1645 hrs., he was in Apt. #3, on 279 Westland St., Htfd., Conn., resided in by Martin Burke, and had seen a sawed-off shotgun in the apartment's bedroom.
5. That, Thompson further states, that he has been told by Burke that the shotgun was stolen in a burglary.
6. That, as a result of the receipt of the information a check was conducted to search the National Firearms Register and Transfer Record, in Washington D.C. Special Agent Hampo was informed that no record could be found of any firearm registered to Martin Burke, of 279 Westland St., Htfd., Conn., this being a violation of Title 26, USC Sec. 58-61d.
7. That, based on the strength of the information provided by the said affiants, there appears to be sufficient probable cause and reasonable grounds to believe that the aforementioned article and contraband, is in the possession of Martin Burke, in the area requested to be searched.

(Over, For Continuing Affidavit; Signatures of Affiant(s); and Jurat)

The undersigned has not presented this application in any other court or to any other judge.  
Wherefore the undersigned prays that a warrant may issue commanding a proper officer to search said person or to enter into or upon said place or thing, search the same, and take into custody all such property.

Signed at <u>West Hartford</u> Connecticut, this <u>21</u> day of <u>August</u> , 19 <u>73</u>	<u>10-11-10</u> SIGNATURE AND TITLE OF PLAINTIFF
Signed at <u>West Hartford</u> Connecticut this <u>21</u> day of <u>August</u> , 19 <u>73</u>	<u>10-11-10</u> SIGNATURE AND TITLE OF DEFENDANT
CURAT described and sworn to before me this <u>21</u> day of <u>August</u> , 19 <u>73</u>	<u>10-11-10</u> SIGNATURE AND TITLE OF CLERK (Court Clerk)

COUNTY OF	TOWN OF	DATE OF SEIZURE	State of Connecticut
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Then and there by virtue of and pursuant to the authority of the foregoing warrant, I searched the person, place, or thing named therein to wit:

and found thereon or therein, seized, and now hold in custody, the following property . . .

which was possessed, controlled, designed, or intended for use as a means of committing the crime described in the foregoing affidavit and application, or is or has been used as the means of committing the crime described in the foregoing affidavit and application, or was stolen or embezzled.

DATE OF THIS RETURN	SIGNED (Officer's signature and department) X
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DISPOSITION CERTIFICATION  
CCT-7D REV. 9-66

In Rem No.

In Rem Judgment Date

TITLE	STATE OF CONNECTICUT vs.	CIRCUIT NO.	IN REM HELD AT (Town)	ON (Date)
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The undersigned hereby certifies that the property inventoried in the foregoing inventory was

- ☐ destroyed pursuant to a judgment of said court
- ☐ ordered confiscated and, according to law, delivered to the clerk of said circuit
- ☐ except \_\_\_\_\_

which was disposed of as follows: \_\_\_\_\_

☐ disposed of as follows: \_\_\_\_\_

ONLY COPY AVAILABLE

DATE OF THIS CERTIFICATE	SIGNED (Ass. Clerk of Court) X
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EXHIBIT 4: RULE 41, FEDERAL RULES OF  
CRIMINAL PROCEDURE

**Rule 41.**

**SEARCH AND SEIZURE**

(a) **Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state within the district wherein the property sought is

located, upon request of a federal law enforcement officer or an attorney for the government.

(b) **Property Which may be Seized with a Warrant.** A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) **Issuance and Contents.** A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(d) **Execution and Return with Inventory.** The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property

## Rule 41 RULES OF CRIMINAL PROCEDURE

was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of Papers to Clerk. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

As amended Dec. 27, 1948, eff. Oct. 20, 1949; April 9, 1956, eff. July 8, 1956; April 24, 1972, eff. Oct. 1, 1972.

§ 54-33a. Issuance of search warrant

(a) As used in sections 54-33a to 54-33g, inclusive, "property" includes, without limitation, documents, books, papers, films, recordings and any other tangible thing.

(b) Upon complaint on oath by any state's attorney or prosecuting attorney or by any two credible persons, to any judge of the superior court or the circuit court, that he or they have probable cause to believe that any property

(1) possessed, controlled, designed or intended for use or which is or has been used or which may be used as the means of committing any criminal offense; or

(2) which was stolen or embezzled, is within or upon any place, thing or person, such judge may issue a warrant commanding a proper officer to enter into or upon such place or thing, search the same or person, and take into his custody all such property named in the warrant.

(c) A warrant shall issue only on affidavit sworn to by the complainant or complainants before the judge and establishing the grounds for issuing the warrant, which affidavit shall be part of the arrest file. If the judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person, place or thing to be searched. The warrant shall be directed to any police officer of a regularly organized police department or any state policeman. It shall state the grounds or probable cause for its issuance and it shall command the officer to search within a reasonable time the person, place or thing named, for the property specified. (1963, P.A. 652, §§ 1, 3; 1965, P.A. 439; 1965, P.A. 574, § 46, eff. July 1, 1965.)

1965 Amendments

1965 P.A. 439 amended subsection (b) by deleting the disjunctive "or" before the word "thing", inserting thereafter the words "or person, such judge";

and by inserting the words "or the person" after the words "search the same".

1965 P.A. 439 also amended subsection (c) by inserting the word "person"

**§ 5861. Prohibited acts**

It shall be unlawful for any person—

- (a) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required by section 5801 for his business or having registered as required by section 5802; or
- (b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or
- (c) to receive or possess a firearm made in violation of the provisions of this chapter; or
- (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or
- (e) to transfer a firearm in violation of the provisions of this chapter; or
- (f) to make a firearm in violation of the provisions of this chapter; or
- (g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or
- (h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered; or
- (i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or
- (j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter; or
- (k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or
- (l) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

Added Pub.L. 90-618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1234.

**§ 5871. Penalties**

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

Added Pub.L. 90-618, Title II, § 201, Oct. 22, 1968, 82 Stat. 1234.

Sec. 29-27. "Pistol" and "revolver" defined. The term "pistol" and the term "revolver" as used in sections 29-28 to 29-38, inclusive, mean any firearm having a barrel less than twelve inches in length. (1949 Rev., S. 4157.)

Sec. 29-28. Permit for selling or carrying pistols or revolvers. No person shall advertise, sell, deliver, or offer or expose for sale or delivery, or have in his possession with intent to sell or deliver, any pistol or revolver at retail without having a permit therefor issued as hereinafter provided. The chief of police or, where there is no chief of police, the warden of the borough or the first selectman of the town, as the case may be, may, upon the application of any person, issue a permit in such form as may be prescribed by the commissioner of state police for the sale at retail of pistols and revolvers within the jurisdiction of the authority issuing such permit. Upon the application of any person having a bona fide residence or place of business within the jurisdiction of any such authority or upon the application of any bona fide resident of the United States having a permit or license to carry any firearm issued by the authority of any state or subdivision of the United States, such chief of police, warden or selectman may issue a permit to such person to carry a pistol or revolver within the jurisdiction of the authority issuing the same, provided such authority shall find that such applicant intends to make no use of any pistol or revolver which he may be permitted to carry thereunder other than a lawful use and that such person is a suitable person to receive such permit. Said commissioner may, upon application, issue, to any holder of any such permit, a permit to carry a pistol or revolver within the state. Each permit to carry any pistol or revolver shall be issued in triplicate and one of the copies issued by said commissioner shall be delivered to the person to whom issued, one shall be delivered forthwith to the authority issuing the local permit and one shall be retained by said commissioner, and the local authority issuing any such permit shall forthwith deliver one of such copies to the person to whom issued and one copy to said commissioner and shall retain one of such copies. No permit for carrying a pistol or revolver shall be issued to an alien under the provisions of this section. (1949 Rev., S. 4158, 4159; 1959, P.A. 615, S. 19.)

See Secs. 53-202, 53-206.

Sec. 29-28a. Application for permit. Notice of decision to applicant. (a) Requests for permits under section 29-28 shall be submitted to the issuing authority on application forms prescribed by the commissioner of state police. Upon written request by any person for a permit not on a prescribed application form, or upon request by any person for such application form, the issuing authority shall supply such forms. When any such request is made in person at the office of the issuing authority, the authority shall supply such application form immediately. When any such request is made in any other manner, the authority shall supply such application form not later than one week after receiving such request. If such application form is not supplied within the time limited by this section, the request therefor shall constitute a sufficient application. (b) The issuing authority shall, not later than six weeks after a sufficient application for a permit has been made, inform the applicant that his request for a permit has been approved or denied. (1963, P.A. 115.)

Sec. 29-29. Information concerning criminal records of applicants for permits. No permit for carrying any pistol or revolver shall be issued under the provisions of section 29-28 unless the applicant for the same gives to the issuing authority, upon its request, full information concerning his criminal record, and

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EXHIBIT 8: DEFENDANT'S MOTION TO SUPPRESS  
(ORDER AND CERTIFICATION OMITTED)

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

vs. :

No. H-74-83 Criminal

MARTIN F. BURKE :

MOTION TO SUPPRESS  
AS EVIDENCE

The defendant Martin F. Burke, through counsel, respectfully moves this Court to suppress as evidence against him in any criminal proceeding the following evidence taken from him by law enforcement agents on August 21, 1973:

1. One Remington, 12 gauge, single barrel shotgun, serial number 114757;
2. All other property taken from the defendant by law enforcement agents on August 21, 1973;

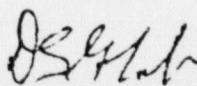
on the grounds that

1. Said property was seized pursuant to a search warrant not founded on probable cause, in violation of the Fourth Amendment of the United States Constitution; and
2. Said property was seized during the course of an illegally executed search, in violation of the Fourth Amendment of the United States Constitution.

Respectfully submitted,

THE DEFENDANT

BY:

  
\_\_\_\_\_  
DAVID S. TELLE  
His Attorney

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